



SO ORDERED.

SIGNED this 11 day of March, 2005.


JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)	
REDIE B. LEWIS)	Case No. 03-41515
)	Chapter 13
Debtor.)	
)	
REDIE B. LEWIS)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 03-7068
)	
BNC MORTGAGE, INC.,)	
OPTION ONE MORTGAGE CORP.,)	
FIRST UNION NATIONAL BANK,)	
KOZENY & MCCUBBIN, L.C.,)	
MILLER ENTERPRISES, INC.,)	
JEFFREY MILLER, Individually,)	
ADAMSON & ASSOCIATES, INC.,)	
MAPLEWOOD MORTGAGE, INC.,)	
and DOES 1-100 Inclusive.)	
)	
Defendants.)	
)	

ORDER GRANTING MOTION TO WITHDRAW BY PLAINTIFF'S COUNSEL

This matter is before the Court on the Motion to Withdraw filed by Plaintiff's counsel, Timothy A. Toth.¹ His motion relates only to the Adversary Proceeding, as Plaintiff retained separate bankruptcy counsel to represent her in the main bankruptcy case. The basis for this motion, filed December 17, 2004, is that counsel has suffered a variety of health-related problems that have caused him to be unable to continue to handle this multi-party litigation. Mr. Toth indicates that Plaintiff does not oppose the motion "so long as she is not thrown to the wolves without time to find other counsel,"² and she has filed no objection to the motion.

Defendants Miller Enterprises, Inc., Jeffrey Miller, BNC Mortgage, Inc., First Union National Bank, Adamson & Associates, Inc., and Kozeny & McCubbin, L.C. filed a joint response, essentially noting that although they were sympathetic to Mr. Toth's health issues, there was little work needing his attention at that time because the motions to dismiss were fully briefed, awaiting court decision. They also claimed they would be substantially prejudiced if substitute counsel were allowed in to the case, because discovery had closed December 3, 2004, and they did not want to be subject to defending new claims or theories that new counsel might propound after the litigation had already been pending, now nineteen months.

¹Doc. No. 189.

²*Id.* at ¶ 8.

Analysis

Withdrawal by counsel is governed in this District by D. Kan. Rule 83.5.5. That Rule requires that the motion be served “on all counsel of record” and “either personally or by certified mail, restricted delivery, with return receipt requested on the withdrawing attorney’s client. Proof of personal service or the certified mail receipt, signed by the client, or a showing satisfactory to the court that the signature of the client could not be obtained, shall be filed with the clerk.” Although it appears counsel has served the motion on opposing counsel, and that he served his client/Plaintiff by regular mail, there is nothing in the record to show that he complied with that portion of D. Kan. Rule 83.5.5 requiring personal service or service by certified mail on Plaintiff.

That said, the record reflects that Plaintiff has actual notice of the Motion to Withdraw. She appeared in person on December 22, 2004 at a hearing on a variety of issues, including her counsel’s instant Motion to Withdraw, which had been set “by emergency” on that docket by her counsel. At that hearing, she voiced no objection to the Motion. Accordingly, the Court finds that although counsel failed to comply with the requirements of D. Kan. Rule 83.5.5 to properly notify his client, that error is not prejudicial to Plaintiff, as she had actual notice, as well as an opportunity to object to the Motion, which she chose not to do.

The Court, at the hearing on the Motion to Withdraw held December 22, 2004, took the motion under advisement for one main reason. That reason is that by that date, the litigation had then been pending for over 15 months, the extended discovery deadlines had expired, and the Court desired to get the case in a trial-ready posture before allowing counsel to withdraw. This required only the filing of a final pretrial order. When he filed the Motion to Withdraw, counsel had failed to comply with

at least two Court orders requiring him to assemble materials from other counsel, and draft a final pretrial order. First, by order dated July 8, 2004, this Court ordered that Plaintiff's counsel submit "one agreed pretrial order, covering all parties and all claims, after consultation ... no later than December 3, 2004."³ He failed to file the agreed pretrial order by that date, and the Court then gave him an informal extension to December 7, 2004. He then filed a Motion to extend the time, again, to file the document, and to continue the pretrial conference set for December 8, 2004.

The Court granted this Motion, and continued the final pretrial conference to December 23, 2004, and required the agreed pretrial order be filed by December 15, 2004.⁴ On December 15, 2004, counsel submitted a 99 page draft pretrial order to the Court (on a one-count complaint), but it did not contain required submissions from many of defense counsel. It was far from being an "agreed order."⁵ Two defense counsel independently contacted chambers to question whether a pretrial order had been submitted, because they claim they were not properly contacted regarding the preparation or contents of that order by Plaintiff's counsel.

Ultimately, on December 15, 2004, the Court determined that because Plaintiff's counsel seemed incapable of following the Court orders regarding submission of a complete pretrial order, and because of the pendency of what then appeared to be serious motions to dismiss, the Court would

³Doc. No. 120.

⁴*See* Doc. Nos. 183 and 187.

⁵The Court well understands that sometimes, certain sections of pretrial orders cannot be agreed, and the Court is then faced with deciding between two opposing positions. That is not the situation here. Instead, Plaintiff's counsel had failed to include required sections in the order, and had apparently failed to timely consult with opposing counsel to meet the deadline.

indefinitely continue the pretrial hearing, until after ruling on the Motions to Dismiss. If those motions were denied, the Court's goal was to get a final pretrial order on file before allowing Mr. Toth to withdraw, believing he was in exclusive possession of the facts and theories under which the case should be tried.

The Adversary Proceeding had been pending since August, 2003, the defendants had been subjected to discovery on three separate complaints, they had filed motions to dismiss each of those complaints, and it did not seem equitable to allow Mr. Toth to withdraw before that final pretrial order was on file, because then substitute counsel would undoubtedly want additional time to get up to speed, and likely also for discovery (the extended deadline for which has long expired) and the ultimate submission of the pretrial order. Accordingly, at the hearing December 22, 2004, the Court declined to allow Mr. Toth to withdraw at that point, since all the pleadings (except the final pretrial order) were already on file, and he would have little to do on the case until after the Court ruled on the numerous motions to dismiss. The other advantage to not allowing him to withdraw in December, 2004 was to allow Plaintiff additional time to find substitute counsel while the Court considered the various outstanding motions.

Well over two months after the December 22, 2004 hearing, the Court has now granted the Motions to Dismiss filed by each of the Defendants. There is thus no continuing need for the filing of a final pretrial order. For that reason, the basis for delaying the decision to allow Mr. Toth's Motion to Withdraw is moot. Thus, the Court is now able to grant Mr. Toth's Motion to Withdraw.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Motion to Withdraw filed by Timothy Toth is granted. The court admonishes Plaintiff that she is now personally responsible for

complying with all orders of the court and time limitations established by the rules of procedure or by court order.

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